

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)
)
Implementation of the Subscriber Carrier)
Selection Changes Provision of the)
Telecommunications Act of 1996)
)
Policies and Rules Concerning)
Unauthorized Changes of Consumers)
Long Distance Carriers)

CC Docket No. 94-129

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**PETITION FOR CLARIFICATION AND RECONSIDERATION
OF RCN TELECOM SERVICES, INC.**

RCN Telecom Services, Inc. ("RCN") and its affiliates respectfully submit this Petition for Clarification and Reconsideration in the above-referenced proceeding¹ pursuant to the Federal Communications Commission's ("Commission") Public Notice released February 16, 1999. RCN seeks clarification and reconsideration in order to provide greater clarity to the Commission's rules and avoid the potential for multiple, inconsistent interpretations of those rules.

RCN and its affiliates provide local and long distance telephone, video, and Internet access services to residential and business customers in a number of markets throughout the country. As such, RCN is directly affected by the Commission's rules adopted in this proceeding and thus has an interest in ensuring that those rules are as clear and unambiguous as possible. Accordingly, RCN respectfully submits herein proposals that, if adopted by the Commission, can assure that the

¹ *In the Matter of Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996, Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers, Second Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 94-129 (rel. Dec. 23, 1998) ("Report and Order" or "FNPRM").*

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Commission's rules protect consumers and provide carriers clear standards which are unlikely to be subject to subsequent modification or invalidation.

I. INTRODUCTION AND SUMMARY

The rules adopted in the *Report and Order*, which implement section 258 of the Communications Act of 1934, as amended,² are intended to provide additional protections against slamming by attaching significant economic disincentives to such activity, clarifying existing verification rules, and broadening the scope of the rules. To accomplish these goals, the Commission crafted liability rules for slamming, clarified its verification rules and extended those rules to all carrier change requests (except for CMRS providers), and established rules for the implementation and lifting of preferred carrier ("PC") freezes.

Although the Commission identified as one goal promoting competition, the Commission emphasized that its primary goal in creating the slamming rules is to protect consumers and provide greater consumer choice. (*Report and Order*, ¶ 16). RCN has focused on the Commission's primary concern of protecting consumers in developed the proposals outlined in this petition. Nonetheless, RCN respectfully submits that if the Commission's slamming rules are ambiguous, or impose unnecessary costs or burdens on carriers, any potential benefit may be outweighed by the cost to consumers and carriers of complying with the rules. Accordingly, RCN respectfully urges the Commission to adopt the clarifications as discussed below.

² 47 U.S.C. § 258.

II. DISCUSSION

1. Reconsideration and Clarification of Liability Procedures (§§ 64.1100, 64.1170 and 64.1180)

Initially, RCN notes industry participants currently are in the process of developing a proposal for an independent administrator for resolving slamming complaints and liability. The Commission encouraged the development of this entity, and determined to delay implementation of its liability provisions. (*Report and Order*, ¶ 57). If an independent administrator is ultimately approved by the Commission, many of the concerns reflected in this petition will likely be resolved. Nonetheless, regardless of the benefits of an independent administrator for slamming issues, there may be carriers that do not participate. The concerns RCN raises here will remain important in such circumstances. Accordingly, the Commission should take the opportunity to clarify its slamming rules now rather than waiting until inconsistent interpretations of those rules makes uniform implementation and enforcement impossible.

A. The Commission Should Not Require Authorized Carriers to Both Investigate and Pursue Alleged Slammers

The Commission's slamming rules currently require an authorized carrier to undertake different actions upon receiving a slamming complaint depending on whether the slammed subscriber has paid the alleged slammer. In short, depending on the circumstances, the rules require the authorized carrier to investigate the alleged slam and make a determination as to the authenticity of the carrier change and/or, upon receipt of evidence that the change was authorized, prove that the change was in fact not authorized. RCN respectfully urges the Commission to reconsider its decision to have the authorized carrier perform these multiple conflicting roles.

Clearly, the requirement that an authorized carrier investigate an alleged slam puts the authorized carrier in the position of investigating and deciding a matter in which the carrier's determination could have both economic and a customer relations impact on the carrier's own business. This situation creates more than just the potential for conflict. Under the Commission's rules, if the authorized carrier determines that a slam has occurred, then the carrier is entitled to reimbursement from the unauthorized carrier, and its customer obtains a refund or a credit for the amount it paid the unauthorized carrier during the customer's first thirty days of service. Although this dual economic incentive may motivate authorized carries to investigate alleged slams, it also creates a significant conflict for the authorized carrier. For any carrier that wants to retain and expand its customer base and maintain good customer relations, a decision finding that a slam occurred will not be a difficult one.

If the Commission determines to leave the existing investigation procedures in place, then RCN urges the Commission to reconsider requiring carriers also to prosecute slamming violations. Under the current rules, if an alleged slammer provides the authorized carrier evidence of a verified carrier change, the burden shifts to the authorized carrier to prove that an unauthorized change did in fact take place. (*Report and Order*, ¶ 44). RCN finds this aspect of the rules particularly troublesome as it appears to assume that an unauthorized carrier change occurred and requires the authorized carrier to prove that fact, even in the face of direct evidence to the contrary.³ Thus, RCN

³ Moreover, by requiring the authorized carrier to prove that a carrier change was unauthorized, in the face of evidence to the contrary, the Commission's rules mandate a significant expenditure of time and resources for which the authorized carrier likely will not be reimbursed even if the carrier proves that a slam occurred and is paid by the unauthorized carrier. It is difficult for a carrier to pass on benefits to its consumers if it is forced to expend a significant portion of its resources pursuing a slam that did not take place.

urges the Commission to amend this aspect of its rules to provide that if an authorized carrier receives adequate proof of verification of a carrier change from an alleged slammer, the authorized carrier should deem the change to be authorized and should not be required to pursue the matter further.

B. The Commission Should Clarify Whether an Investigation is Required for All Slamming Complaints

The Commission's rules, as currently drafted, establish a separate process for addressing instances of slamming depending on whether the subscriber has paid any amounts to the slamming carrier. Specifically, section 64.1170, which applies when the subscriber had paid the unauthorized carrier, provides that the unauthorized carrier reimburse the authorized carrier and the subscriber for any amounts collected from the subscriber. Section 64.1180, which applies when the subscriber has not paid the unauthorized carrier, provides that the authorized carrier must investigate the complaint and determine whether a slam occurred. As it is unclear from the rules precisely which situations require investigation and which require reimbursement, RCN urges the Commission to clarify these procedures.

In its discussion of the rules, the Commission appears to imply that an authorized carrier must conduct an investigation when an allegedly slammed subscriber has not paid the unauthorized carrier. However, the actual text of Sections 64.1170 and Section 64.1180 address investigation differently. Section 64.1180, which is titled "Investigation Procedures," contains procedures an authorized carrier must follow for investigating an alleged slam and notifying the complaining subscriber as to the outcome of that investigation. Section 64.1170, on the other hand, does not specify any investigation procedures and does not contain any requirement that the authorized carrier

notify a complaining subscriber as to whether the unauthorized carrier has provided proof of verification of the carrier change. The absence of any investigation provisions in Section 64.1170, together with the fact that it is titled "Reimbursement Procedures" leads one to the conclusion that this section presumes that a slam has occurred in those situations where the subscriber has paid an allegedly unauthorized carrier.

RCN further submits that, in addition to clarifying the procedures for investigating an alleged slam, the Commission should clarify the procedures by which carriers are to notify one another of slamming complaints. Specifically, RCN submits that any time a carrier receives a slamming complaint about another carrier, the carrier receiving the complaint should attempt to immediately notify the alleged slammer of the complaint. This requirement will not only pave the way for an authorized carrier's later investigation, but it will give the alleged slammer an opportunity to address the issue quickly so that all parties, particularly the consumer, are not harmed by delay.

C. The Commission Should Clarify That an Executing Carrier is Fully Liable for an Unauthorized Carrier Change When the Carrier Improperly Executes a Carrier Change Request

The Commission's rules provide that an executing carrier may be liable for an authorized change where the executing carrier improperly executes an otherwise lawful change request. (*Report and Order*, ¶ 54). In these circumstances, the executing carrier should be fully liable as an unauthorized carrier and should be required to reimburse the subscriber and/or the authorized carrier for such error in accordance with the provisions of sections 64.1170 and 64.1180. The Report and Order is somewhat unclear as to precisely what liability attaches to an improper execution by an executing carrier. For example, one could argue that the order imposes liability on an executing carrier only to the extent of any damages provided in state or federal court, Commission proceedings,

or forfeiture penalties imposed by the Commission pursuant to section 503(b) of the Act. (*Report and Order*, ¶ 54 n. 173). If that is the case, subscribers and authorized carriers are left without any way under the slamming rules to recover the costs they incur as a result of an improperly executed submission request.

2. The Commission Should Clarify That LECs Must Verify IXC Orders Received Directly from Customers Where the Customer Requests the LEC as its IXC

Although the Commission states throughout the *Report and Order* that all carrier change orders must be properly verified, paragraph 93 of the *Report and Order* provides that a LEC does not need to obtain a verification when a customer contacts the LEC directly to change his or her IXC. RCN is concerned that LECs may interpret this provision to avoid having to verify the authenticity of customers' requests to select the LEC as their IXC. RCN respectfully submits that a minor clarification is required to remove this interpretation. Specifically, the Commission should clarify that the LEC must verify a customer's order in situations where the IXC selected by the customer is the LEC itself, to the extent the LEC provides IXC services, or an IXC affiliate of the LEC.

3. Preferred Carrier Freezes

A. The Commission Should Clarify That LECs Must Accept Requests to Implement PC Freezes and Lift PC Freezes from All Carriers

RCN submits that incumbent LECs could interpret the Commission's PC freeze regulations, as currently drafted, to require that customers must submit requests to initiate or lift a PC freeze directly to the LEC that actually implements the PC freeze (usually RBOCs) in order for the request to be valid. Thus, the LEC could refuse to honor all customer requests submitted by carriers on their customers' behalf. Under this interpretation, all carriers other than the RBOC would be effectively precluded from providing their customers a complete package of services. More importantly, all

carriers other than the LEC would have to refer their customers to the LEC -- one of their principal competitors -- in order to enable the customer to initiate or lift a PC freeze. Similarly, Section 64.1190(d)(2), which addresses the requirements for initiating PC freezes, requires that the LEC have obtained written and signed authorization or electronic verification prior to implementing a PC freeze. Although the requirement that a request be properly verified before it is implemented will protect consumers by reducing unauthorized changes, it is conceivable that a LEC may use this requirement to claim that it can not honor an LOA or other appropriate verification obtained by a non-facilities based LEC or by an IXC to initiate a PC freeze.

The interpretation discussed above would clearly provide an unwarranted competitive advantage for the LECs that control the implementation of the majority of PC freezes, particularly because in most cases the LECs that control the implementation of PC freezes are the incumbent LECs. Furthermore, this interpretation of the Commission rules could give those LECs controlling implementation of PC freezes both the incentive and the means to insert themselves into the relationship between consumers and their chosen carrier. RCN respectfully requests that the Commission confirm that LECs must accept properly verified customer requests to implement and/or lift PC freezes from any carrier.

B. The Commission Should Clarify that Requests to Change Carriers and Initiate PC Freezes Can Be Obtained in the Same Transaction

The Commission's rules could be interpreted to require that requests to change carriers and to initiate or lift a PC freeze must be processed in separate transactions and be separately verified. RCN respectfully urges the Commission to clarify that carriers may obtain authorization/verification of a carrier change order and implementation or lifting of a PC freeze in the same transaction (*e.g.*,

LOA, telemarketer call, subscriber request). Specifically, RCN seeks clarification that a carrier can include a section authorizing or lifting a PC freeze as a separate section on its LOA, assuming the LOA complies fully with the Commission's rules, or can include LOAs for a carrier change and a PC freeze with the same marketing package. Similarly, RCN seeks clarification that a telemarketer may include an authorization for a PC freeze and a sale and verification in the same call if the telemarketer or the carrier obtains a separate authorization and verification for each item.

4. The Commission Should Preempt State Regulation of Verification Procedures for Carrier Change Requests

Although some state enforcement of the carrier change process is necessary and useful, RCN respectfully requests that the Commission reconsider its decision not to preempt state regulations governing verification procedures for PC change requests. Preemption avoids the potential morass of inconsistent state and federal regulations that will likely result. While the costs to carriers of complying with such varying requirements could be significant, consumers would realize little additional protection from a variety of regulatory regimes. Furthermore, a multiplicity of verification procedures increases the likelihood that consumers may be confused or overwhelmed by the verification process, particularly if the consumer must initiate carrier changes or PC freezes in a number of different states.


At a minimum, the potential cost to carriers of attempting to comply with up to 51 varying sets of carrier change regulations could impede the development of innovative marketing. Thus, the public interest, particularly the interest of consumers in quality, low-cost service choices, would best be served if the Commission declares that its verification rules preempt state regulation (but not enforcement of verification procedures).

III. CONCLUSION

RCN commends the Commission for adopting comprehensive rules to reduce instances of slamming. Nonetheless, RCN believes that the clarifications described in this Petition will result in clear and unambiguous rules that provide protection to consumers.

Respectfully submitted,

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